

In the Matter of)
JPJ ELECTRONIC COMMUNICATIONS, INC.)
For Informal Request to Modify Station KNNQ312,)
Licensed to the Town of Clay, New York)

MEMORANDUM OPINION AND ORDER

Adopted: March 13, 2002

Released: March 20, 2002

By the Commission:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we address the Application for Review and Informal Request for License Modification filed by JPJ Electronic Communications, Inc. (JPJ) on March 8, 2001 and March 28, 2001, respectively.¹ JPJ asks the Commission to reverse the *Order on Reconsideration (Order)*² in which the Public Safety and Private Wireless Division (Division) upheld the decision of its Licensing and Technical Analysis Branch (Branch)³ dismissing JPJ's earlier request to modify the above-captioned license of the Town of Clay, New York (the Town).⁴ For the reasons set forth below, we deny the Application for Review and dismiss the Informal Request.

II. BACKGROUND

2. On June 12, 1995, the Commission granted Irvin Geib (Geib) a license to operate an 800 MHz conventional Specialized Mobile Radio (SMR) system on the frequency pair 806/851.5375 MHz (Channel 22) in Deerfield Township, New York, under call sign WPHM952.⁵ On January 10, 1996, the Town filed an application with the Commission for a new 800 MHz trunked system that included

¹ JPJ Electronic Communications, Inc. Application for Review, filed March 8, 2001 (Application for Review); JPJ Electronic Communications, Inc. Informal Request for License Modification, filed March 28, 2001 (Informal Request).

² JPJ Electronic Communications, Inc, DA 01-277, *Order on Reconsideration*, (rel. Feb. 6, 2001) (*Order*).

³ Letter from Mary Shultz, Chief, Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, FCC to JPJ Electronic Communications, Inc., dated June 12, 2000 (Branch Letter).

⁴ Application for Review; JPJ Electronic Communication, Inc., Request for License Modification, filed December 23, 1999 (Request).

⁵ See *Order* at ¶ 2.

Channel 22, and which the Commission granted on April 12, 1996, under Call Sign KNNQ312.⁶ The Commission's licensing records reflect that Geib's 1995 license was superseded on July 30, 1996, when on June 11, 1996 he certified operation of only two mobile units.⁷ Geib subsequently assigned this authorization to JPJ.⁸

3. On December 23, 1999, JPJ filed its Request seeking to have the Commission modify the Town's license to move to another frequency.⁹ On June 12, 2000, the Branch dismissed JPJ's Request after deeming it to be a late-filed petition for reconsideration of the Commission's April 12, 1996 action granting the Town a license for Station KNNQ312.¹⁰ On July 12, 2000, JPJ filed a petition for reconsideration, contending that the Branch erred in concluding that it lacked authority to consider JPJ's Request.¹¹ The Division released an *Order* granting the Petition in part and denying it in part. While agreeing with JPJ that the Branch erred in dismissing the Request for being an untimely petition for reconsideration, the Division denied the Petition on its merits.¹² Specifically, the Division found that the public interest would not be served by deleting the Town's authority to operate on 851.5125 MHz because: (1) JPJ had not substantiated its claims of harmful interference through affidavits, documents, or engineering showings;¹³ (2) JPJ waited approximately three years after it should have become aware of any interference problems to initiate this proceeding;¹⁴ (3) JPJ's predecessor (and thus, JPJ) held the license, authorized for only two mobile units, on a shared, non-exclusive basis;¹⁵ and (4) the Town is a public safety entity that provides important communications services intended to protect the safety of life, health, or property, and had acted in good faith.¹⁶ On March 8, 2001, JPJ requested that the Commission review the Division's decision.¹⁷ Subsequently, both parties filed oppositions and other pleadings.¹⁸

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at ¶ 3.

¹⁰ *Id.*

¹¹ *Id.* at ¶ 4.

¹² *Id.* at ¶¶ 5-7.

¹³ *Id.* at ¶ 6.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at ¶ 7.

¹⁷ Application for Review; Informal Request.

¹⁸ Town of Clay Opposition to Application for Review, filed March 20, 2001 (Opposition); Town of Clay Motion to Strike Informal Request for License Modification, filed April 5, 2001; JPJ Electronic Communication, Inc. Opposition to Motion to Strike Informal Request for License Modification, filed April 17, 2001.

III. DISCUSSION

4. In its Application for Review, JPJ makes the following arguments: (1) the Division erred in faulting JPJ for failing to substantiate its claims of harmful interference through affidavits, documents, or engineering showings because Section 90.621 of the Commission's Rules defines situations where interference is taking place;¹⁹ (2) it was improper for the Division to fault JPJ for not filing its Request until three years after the Town's license was granted;²⁰ (3) a license modification would be in the public interest because the Town allegedly agreed to switch frequencies and because a modification would allow both parties to operate without interference;²¹ and (4) the fact that Geib was only licensed for two mobile units is irrelevant because the Town operates a trunked radio system that always interferes with Station WPHM952, a conventional radio system.²² We reject each of these arguments and affirm the Division's *Order*.

5. JPJ's reliance on Section 90.621 of the Commission's Rules to establish interference "*per se*" is misplaced.²³ While the Town's initial license may have been granted in error on April 12, 1996, by June 11, 1996, only two months later, the application would have been properly granted because Geib's certification of operation for only two mobile units caused him to lose any right to co-channel protection.²⁴ Therefore, the Commission properly granted the Town's application to modify these facilities on December 17, 1997. Essentially, after Geib's initial failure to protest the Town's license grant and his subsequent certification of only two mobiles, Geib lost the ability to contest the Town's license. In this connection, we believe that the Town is correct that JPJ "received the full benefit of its bargain" when it acquired Geib's license, as its due diligence review should have revealed the existence and location of the Town's system.²⁵ Nonetheless, even if we were to find that JPJ has shown the existence of interference between Stations KNNQ312 and WPHM952, after careful analysis of all the relevant circumstances present in this case, we would still conclude that the Division was correct in its determination that the public interest would not be served by deleting the subject frequency from the Town's license.²⁶

¹⁹ Application for Review at 3-4.

²⁰ *Id* at 4-5.

²¹ *Id* at 5.

²² *Id* at 5-6.

²³ Applications for Review at 3.

²⁴ 47 C.F.R. § 90.621(c) (1995) (conventional systems which have not met the loading levels necessary for channel exclusivity will not be afforded co-channel protection).

²⁵ Opposition at 4.

²⁶ In its Application for Review, JPJ submits an engineering exhibit that purports to show asserts that there is interference between Stations WPHM952 and KNNQ312. Application for Review, Exhibit 5. 47 C.F.R. § 1.115(c) states that "[n]o application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass." Since JPJ never submitted this exhibit to the Division, we will not consider this new material. *See* Battery City Car and Limousine Service, Inc., *Memorandum Opinion and Order*, 14 FCC Rcd 21089 n.10 (1999).

6. JPJ's next argument is that the Division erred when it dismissed JPJ's Petition for "JPJ's alleged failure to explain why JPJ waited until December 23, 1999 to file its Request."²⁷ Moreover, JPJ argues that because the Division already had recognized that JPJ could not have timely filed a Petition for Reconsideration of the grant of the license, any additional explanation "is not required by the Commission's Rules."²⁸ JPJ is incorrect to the extent it argues that the reasons for the delay in its filing are irrelevant in this case. While the Commission's Rules do not establish an absolute deadline for filing a license modification request, and we do not create one here, the length of time that the target licensee has had its license directly relates to that licensee's likely level of investment in constructing and operating its facilities, as well as its reliance on that station. From this perspective, the amount of time a party waits to request the modification of another licensee's authorization is certainly a legitimate question for consideration as part of the public interest, convenience, and necessity inquiry required by the Communications Act.²⁹ JPJ did not file its request for modification until two years after the Town's properly granted and uncontested modification application was granted in December 1997. At the time of that grant, JPJ's predecessor-in-interest had certified operation of only two mobile units, and consequently, had lost the right to contest the Town's modification application. Accordingly, we reject JPJ's arguments.

7. JPJ also argues that in making its public interest determination, the Division was wrong to emphasize the deletion of the subject frequency from the Town's license because JPJ recommended "a different frequency to replace it."³⁰ Furthermore, JPJ reasons, the Town agreed to switch frequencies and "[t]hus, the public interest was well served by JPJ's request, as it would permit both entities to effectively and efficiently operate their systems."³¹ The fact that JPJ suggested an alternative frequency, rather than merely asking that the Commission delete the particular frequency, is of little decisional significance, as the record in this proceeding demonstrates that there are no suitable alternative public safety frequencies for the Town's system.³² Consequently, contrary to JPJ's assertion, were we to delete 851.5125 MHz from the Town's license, both entities would not be able to effectively and efficiently operate their systems. In addition, we note that the Town specifically withdrew its offer to change to another public safety frequency when it found out that the frequency suggested by JPJ turned out to be adjacent to a channel already used in the Town's system, and was therefore not usable.³³

8. Finally, JPJ avers that because the Town operates a trunked radio system that by rule cannot share a frequency with a conventional radio system, the fact that Geib (and subsequently JPJ) was licensed for only two mobile units and consequently held 851.5125 MHz on a shared, nonexclusive basis, is irrelevant in this case.³⁴ While JPJ provides no citation for such a rule, we note that former Section

²⁷ Application for Review at 4.

²⁸ *Id.*

²⁹ 47 U.S.C. § 316(a).

³⁰ *Id.*

³¹ *Id.*

³² See Town of Clay Opposition to Request for License Modification at 2-3, filed January 18, 2000; Town of Clay Amendment to Opposition to Request for License Modification at 1-2, filed January 19, 2000.

³³ See Town of Clay Amendment to Opposition to Request for License Modification at 1-2, filed January 19, 2000.

³⁴ *Id.*

90.615 of the Commission's Rules provided that in forming certain trunked systems, applicants must first obtain the written consent from all co-channel licensees located within seventy miles of the proposed trunked system.³⁵ Although WPHM952 is located less than seventy miles from KNNQ312, that Section is inapposite in this case because Station KNNQ312 is a Canadian border region station that was never governed by Section 90.615 of the Commission's Rules.³⁶ Thus, JPJ's argument here is unavailing.

9. Finally, we will dismiss the Informal Request, which also seeks to modify the authorization for Station KNNQ312 by deleting frequency 851.5375 MHz from its license. The Commission is not required to entertain informal requests.³⁷ We believe it would be an inefficient use of the Commission's resources to consider the request because JPJ merely reiterates arguments contained in its Application for Review and previously filed Request.

IV. CONCLUSION

10. After careful consideration of all the relevant facts and circumstances in this case, we believe that the Division's determination that the public interest would not be served by modifying the Town's license for Station KNNQ312 was correct. Even assuming that harmful interference exists between the subject stations, the record weighs in favor of the Town. Therefore, we affirm the decision of the Public Safety and Private Wireless Division, Wireless Telecommunications Bureau that the public interest would not be served by deleting the subject frequency from the Town's license.

V. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, the Application for Review filed by JPJ Electronic Communications, Inc. on March 8, 2001, IS DENIED.

12. IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.41 of the Commission's Rules, 47 C.F.R. § 1.41, the Request for License Modification filed by JPJ Electronic Communication, Inc. on March 28, 2001, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

³⁵ 47 C.F.R. § 90.615(b)(2)(ii) (1995).

³⁶ Former Section 90.615 of the Commission's Rules applied only to "operations in areas farther than . . . 140 km (87 miles) from the U.S./Canada border." 47 C.F.R. § 90.615(a)(1995).

³⁷ See, e.g., *Automobile Club of Southern California, Order on Reconsideration*, 16 FCC Rcd 2934 ¶ 6 (2001) and *Colorado RSA 7B(2) Limited Partnership, Order*, 13 FCC Rcd 22079, 22081, n.17 1998.